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In The

SUPREME COURT OF THE UNITED STATES

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October Term, 1977

No. 77-389

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CARL E. PERSON,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Respondents.

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# PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Carl E. Person, Petitioner,
Pro Se
132 Nassau Street
New York, N.Y. 10038

(212) 349-4616

October 11, 1977

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This reply by petitioner, under subparagraph 4 of Rule 24 of the Rules of the Supreme Court, is addressed to arguments first raised in the brief in opposition. Respondents' brief raises issues rejected by the District Court



and Court of Appeals, both of which reached the present constitutional issues. Petitioner's response to these non-constitutional issues being raised by Respondents follows:

## I. NO FACTUAL ISSUES

There are no factual issues, contrary to the assertion at pp. 4-5 of Respondents' brief. Respondents filed no affidavits in opposition to Petitioner's motion for a summary declaratory judgment or at any other time (except attorneys' affidavits) and chose not to notice or otherwise request discovery at any time, apparently to avoid raising any factual issues. The record reflects no oral requests for discovery at any time. Respondents' claim of discovery denial was raised and heard in the Court of Appeals, and rejected.

## II. AVAILABILITY OF 3 EXPERTS TO TESTIFY FOR CONTINGENT FEE

Petitioner had more than one expert willing to testify on a contingent-fee basis, contrary to the assertion at pp. 6-8 of Respondents' brief. Three different prospective expert witnesses (Mr. Spector - accounting; Mr. Siegel - accounting; and Mr. Seplaki - economist) had advised petitioner they would be willing to perform expert services and testify as expert witnesses for the Nabcor Plaintiffs on a contingent-fee basis, assuming DR 7-109C was not a barrier, but they wanted to learn more about the nature of the Nabcor action before deciding to enter into an agreement to provide the desired services.

Judge Dooling said that DR 7-109C makes it difficult for persons in petitioner's position to enter into any agreements with prospective expert witnesses



(22a-25a) and the Second Circuit said that Respondents' argument was without merit (Note 6 at 62a). Respondents' assertion at p. 8 of their brief that the Court of Appeals did not address the issue is clearly erroneous.

## III. ONLY ONE OF THE VARIOUS SEVERED NABCOR ACTIONS HAS BEEN TRIED

The Nabcor action has not ended, contrary to the implication at p. 6 in Respondents' brief. The Nabcor action was severed into various actions, and only the first severed part, against GM, GMAC, a dealer association and 5 GM dealers, was tried October-December, 1976. The "other phases of the case remain to be decided". Judge Griesa's bench opinion, 1976-2 Trade Cases ¶ 61,211, at p. 70,511. The first part (the GM action) is on appeal in the Second Circuit, under Docket No. 77-7037.

## IV. PRIOR NEW YORK CASE LAW PERMITTED SOME CONTINGENT-FEE ARRANGEMENTS WITH EXPERTS

Matter of Shapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1st Dept., 1911) does not hold that contingent-fee arrangements with experts are illegal in New York, contrary to the assertion in the footnote at p. 9 of Respondents' brief. The case involved testimony by an attending physician. The physician was not an expert witness because the attorney was unable to establish liability without testimony from this particular physician. Accordingly, he was needed to testify as to certain facts that only he had observed, and his testimony could have been obtained by subpoena. The contingent-fee arrangement was not called to the court's attention. 144 App. Div. 6. The dictum at 141 App. Div. 10 does not say that all contingent-fee arrangements in New York are



illegal. In light of the facts, it appears to mean that contingent-fee arrangements are illegal when the witness is being paid to falsify his testimony.

The Marine Midland case, cited at p. 37 in petitioner's brief, is a 1961 decision of the First Appellate Division, permitting a contingent-fee arrangement for the expert witness involved. Clearly, New York's rule prior to adoption of the DR 7-109C in 1969 was to permit some types of contingent-fee arrangements with expert witnesses, but adoption of DR 7-109C by the ABA in 1969, followed by automatic adoption by the New York State Bar Association and the Appellate Divisions, effective January 1, 1970, changed such forward-looking direction. In other words, the Appellate Division, when it considered the matter, upheld some use of contingent fees for expert witnesses.

## V. NO BALANCING OF INTERESTS BY ANY NEW YORK STATE AGENCY

New York State did not balance the competing interests, contrary to the assertion at pp. 9, 11 and 20 of Respondents' brief. DR 7-109C was adopted automatically, without any balancing of interests, by the New York State Bar Association and the New York Appellate Divisions. The New York Appellate Divisions have made no showing that they even were aware of DR 7-109C when the Code of Professional Responsibility was adopted, by reference; en toto. None of the Respondents has attempted to show that any of them performed any balancing of interests.

## VI. NABCOR PLAINTIFFS CANNOT PAY FOR NEEDED EXPERT WITNESSES

The Nabcor Plaintiffs are impoverished, contrary to the assertion at p. 16 of Respondents' brief. The record clearly shows without contradiction that the Nabcor



Plaintiffs do not have the resources needed to pay for the services of the expert witnesses needed by them and that the Nabcor Plaintiffs in fact did not use expert witnesses because of their inability to pay the fees requested by various experts, which resulted in a loss of the preliminary injunction motion made by the Nabcor Plaintiffs in 1973, as well as the trial itself (which loss could have been prevented by having expert witnesses testify on the ultimate issues of liability and damages). (It should be understood that the Nabcor Plaintiffs are maintaining, with great justification, that their action against GM was improperly dismissed, for various reasons, including the sufficiency of evidence.)

## VII. NONE OF THE NABCOR PLAINTIFFS WERE EXPERTS THEMSELVES

None of the 10 Nabcor Plaintiffs could have been expert witnesses themselves,

contrary to the assertion in the footnote at p. 16 of Respondents' brief. The record does not show that any of the Nabcor Plaintiffs was qualified to testify as an expert witness in any of the areas of expertise in which expert testimony was needed.

Significantly, Respondents failed to respond to petitioner's argument that various types of contingencies, such as substantial continuing business relationships with the employing attorney or his client, are not prohibited by DR 7-109C. The end result is irrational — that wealthy litigants are permitted to use expert witnesses who have an economic interest in their own testimony whereas poor litigants, who usually have only one type of contingency available (the contingent-fee arrangement) are prohibited from using such contingency. This prohibition adds unnecessarily and substantially to the



existing burdens of poor litigants in the judicial system where the ability to obtain "justice" too frequently depends on the size of the litigants' bank account.

## CONCLUSION

DR 7-109C should be declared unconstitutional absolutely, or unless and until the rule is amended to include a prohibition of other types of contingencies, as well.

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Carl E. Person, Petitioner,
Pro Se
132 Nassau Street
New York, N.Y. 10038

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